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SPECIAL CIVIL APPLICATION NO.63 of 1996

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SPECIAL CIVIL APPLICATIONS NO. 437 AND 471 OF 1996

Date of Decision: 22.2.1996

Haryana Chemicals & Pesticides vs. State of Gujarat & Ors.
President Industries, Ahmedabad vs.State of Gujarat & Ors.
Chemet Chemicals, Ahmedabad vs.State of Gujarat & Ors.

FOR APPROVAL AND SIGNATURE

THE HON'BLE MR. JUSTICE N N MATHUR

1. Whether Reporters of local papers may
be allowed to see the judgment?

2. To be referred to the Reporter or not?

....

the fair copy of judgment?

4. Whether this case involves a
substantial question of law as to the
interpretation of the Constitution of
India, 1950 or any order made
thereunder ?

5. Whether it is to be circulated to the
Civil Judge ?

Special Civil Application No. 63/96

Mr Y N Oza, Advocate for the petitioner

Special Civil Applications No.437, and 471/96

Mr P J Patel with Mr V H Desai, Advocate for the petitioners

Mr Haroobhai Mehta, Sr. Counsel with Mrs. Vasavadatta Bhatt. for respondents

Mr M R Anand, Sr.Counsel & Government Pleader with Ms.Harsha Devani, AGP for the State

CORAM ; N N MATHUR, J.

(February 22, 1996)

2.2.1996

ORAL (COMMON) JUDGMENT

As the controversy involved in these petitions are common in nature, all these Special Civil Applications are disposed of by this common judgment. The facts in brief are as under:

In response to a notice inviting tenders by the Director, Central Medical Stores Organisation, Gujarat for supply of Malathion 25% Water Dispersible Powder ("WDP with ISI mark" in the total quantity of 558 Metric Tons. 8 firms submitted tenders and quoted the prices as under:

Sr. No.	Name of the Company	Qty. offered	Rate (Rs)	Specificaltion
1.	Hari Chemicals, Ahmedabad	558 M.T.	36,230.70	
2.	President Ind. Ahmedabad	150 M.T.	37,595.00	S.S.I. Guj.
3.	Haryana Chem. & Pesticides, Delhi	558 M.T.	38,610.00	S.S.I. Haryana
4.	Hindustan Pulverising Mills, Delhi	140 M.T.	38,817.00	S.S.i Delhi
5.	Heema Pesticides Delhi	558 M.T.	38,810.00	S.S.I,U.P
6.	Pesto-Chem India	No		S.S.I.

Ltd., Delhi	clarity	38,810.00	Delhi
7. Hindustan Insec- ticides Ltd.	558 M.T.	39,263.00	..
8. Gujarat Small Industries Corp.Ltd. Ahmedabad	558 M.T.	39,490.00	Principal

It may be stated that the tenders were invited in anticipation of approval of the State Government. The decision of the State Government to accord sanction to procure insecticides, subject to one of the conditions to purchase the Malathion 25% either from the public sector undertaking of the Central Government or from any other firm which is originally manufacturing pesticides by inviting tenders was conveyed under communication dated 14.12.1995. However, immediately a corrigendum dated 15.12.1995 was issued to the effect that purchase of Malathion 25% is to be made from Hindustan Insectides Ltd., a Government of India Undertaking which is also manufacturer of basis insecticide.

2. Mr G P Patel, In-charge Assistant Director (R.C.) Central Medical Stores Organisation, Gandhinagar has filed affidavit-in-reply stating inter-alia that Malathion is an insecticide used for the purpose of Malaria Eradication Programme undertaken by the Government of Gujarat. The aforesaid programme is implemented through the respondent No.2, the Commissioner of Health Service and Health Department. Malathion is to be used for insecticidal spray in the highly malaria infected area of the State. The Central Medical Stores Organisation (hereinafter referred to as 'CMSO') is the central purchasing authority for the Health Department to the Government. The programme is to be implemented through the respondent No.2 Commissioner of Health Service and Health Department and thus on receiving the requirement from the Administrative Department the CMSO invites tenders in anticipation of the approval of the Government. In the present case, the CMSO send the proposal for purchase of insecticides to the State Government for approval and simultaneously invited tenders, in anticipation of approval, as entire process with respect to purchase of insecticides was to be completed before 31.3.1996. The Government approved grant by impugned resolution dated 14.12.1995 and 15.12.1995. The final decision is to be taken by the Secretaries/Purchase Committee in accordance with the policy decision taken by the Government. An affidavit is also filed by Mr S.M.

Chunara, Under Secretary, Health and Family Welfare, Sachivalaya, Gandhinagar, stating that the decision to purchase insecticides only from Hindustan Insecticides Ltd. (for short, 'HIL') is purely a policy decision taken by the Government based on past experience.

3. Mr Y N Oza, learned Advocate submitted that in commercial transaction, no reservation can be made restricting to one party. A Government company cannot claim priority over other companies in commercial transaction. He relies on a decision of the Apex Court in the case of STERLING COMPUTERS LTD. v. M/s. M & N PUBLICATIONS LTD. & ORS., reported in 1993 (1) JT 187. He further submits that no reason has been assigned for excluding the petitioner and other companies from consideration. He has also pointed out that HIL has supplied Malathion 25% to other States at a lower price than what was quoted for State of Gujarat. By accepting the tender of HIL, the State Government will be put to loss of Rs. 10 to 15 crores.

4. Mr Haroobhai Mehta, Sr. Advocate for HIL submits that a bonafide decision has been taken by the public authority and the same does not call for any interference by this Court in exercise of powers under Article 226 of the Constitution of India. He submits that preference shown to a Government Company cannot be considered as discriminatory as they stand on a different class altogether. He has placed reliance on the decision of the Apex Court in the case of Hindustan Paper Corporation Ltd. vs. Government of Kerala & Ors., reported in AIR 1986 SC 1541.

5. Mr P J Patel, learned Advocate for the petitioner in Special Civil Applications No.437 and 471/96, while adopting the contentions raised by Mr Y N Oza, in addition, submits that the petitioner in the said Special Civil Applications are the SSI (Small Scale Industry) Units from Gujarat and therefore that status cannot be distinguished from Government of India Undertaking. He further submits that the State of Gujarat has framed the policy to give priority to the Small Scale Industries of Gujarat in the matter of purchase. The policy has been placed on record at Annexure 'A' to the said petition. He submits that the policy at Annexure 'A' is framed with a view to promote the small scale industries. The impugned policy under the Resolution dated 14/15.12.1995 is in disregard to the policy at Annexure 'A'. He further submits that the policy also amounts to irrational consideration. The other contention of Mr Patel is that the tenders were invited for supply of 558 M.T. Malathion. Now the respondent intend

to purchase double quantity of that from HIL for which no tenders have been invited.

6. At this stage, the learned Advocate for the petitioner submits that let the State Government consider if the part of the requirement of Malathion can be purchased from SSIs units. Mr Haroobhai Mehta, Sr.Counsel submits that in such an event, the HIL may be permitted to supply the original fixed quantum of 558 M.T.

Considering the facts of the case, the interim order is modified to the extent that pending decision, it will be open for the State of Gujarat to purchase Malathion 25% to the extent of 300 M.T. from the respondent No.3-HIL, which shall be without prejudice to the rights and contentions of the parties and further it shall be subject to any order passed by this Court. S.O. to 29.2.1996.

20.2.1996

7. On joint request of the learned counsel for the parties, the matter was taken up on 19.2.1996, and then today i.e. on 20.2.1996. Reverting back Mr M R Anand, learned Government Pleader reports that pending this Special Civil Application, the State Government is not inclined to take any policy decision with respect to purchase of part of the requirement of Malathion from SSI units. He however, submits that if any representation is made in this respect, the same shall be considered at an appropriate stage. In view of this, I proceed to decide the matter on merits.

8. Mr Oza, learned Advocate for the petitioner in Special Civil Application No.63 submits that the subject of transaction being a commercial transaction, no reservation can be restricted to one party. The Government of India cannot claim priority over the other Companies in commercial matters. He relies on a decision of the Apex Court in the case of Sterling Computers Ltd. (Supra). In that case, the tenders of United India Periodicals Pvt. Ltd. (for short 'UIP') was accepted and as per the original agreement, UIP was to publish directories every year for a period of five years from 1987 to 1991 and to pay royalty of Rs.20.16 crores to the Mahanagar Telephone Nigam Limited (for short 'MTNL') and to supply directories free of cost. The UIP committed default so much that the directories for the year 1988 were published in the year 1990. Thus, supplemental agreement was entered between the UIP, UDI, MTNL and Sterling Computers Ltd. to carry out

the unexecuted portion of the agreement. It may be stated that the UDI (United Database (India) Pvt.Ltd.) is a subsidiary of UIP. Inspite of the fact that the original agreement with the UIP was upto March 1991 for Rs.20.16 crores, by supplemental agreement, the Sterling Computers Ltd. (for short, 'Sterling') was given contract to publish 13 issues of Delhi and Bombay directories for 7 years including 1991 i.e. upto 1998 for an amount of Rs.10 crores only. The said supplemental agreement was challenged on the ground that under the garb of a supplemental agreement, a fresh contract was awarded on fresh terms without inviting tenders. Before the High Court, the stand of the MTNL was that the supplemental agreement was the result of bonafide commercial decision free from any bias or malice. The High Court came to the conclusion that supplemental agreement of the year 1991 cannot have the extension of the original agreement of the year 1987. According to the High Court, supplemental agreement was tainted with malice - the object being to provide unjust enrichment to UIP/UDI/Sterling.

22.2.196

9. On appeal by the Sterling, the Apex Court while dismissing the appeals, affirmed the judgment of the High Court. In that case, no question with respect to giving contract to Government Companies was involved. The Apex Court only impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authority so that they may enter into contracts with persons keeping an eye on the augmentation of the revenue. But even in such matters, they have to follow the norms recognised by the Courts while dealing with public property. The Court further held that it is not possible for the Courts to question and adjudicate every decision taken by the authority because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like quasi judicial authority while awarding contracts. The Court said that if the decision has been taken in a bonafide manner although not strictly following the norms laid down by the Courts, such decisions are upheld on the principle that the Courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive.

10. The Apex Court, in a recent decision in the case of *Tata Cellular v. Union of India*, reported in AIR 1996 SC 11 has provided certain limitations in the matter of exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. The Court held that it is expected from the Government authorities that they protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. The Court further held that there can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrariness but if the said power is exercised for any collateral purpose, the exercise of that power will be struck down.

11. The Supreme Court, in the case of *Food Corporation of India v. Kamdhenu Cattle Food Industries*, reported in AIR 1993 SC 1601 held that a bonafide decision of the public authority reached after giving due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision which is always a question of facts in each case, keeping in view the larger interests which would satisfy the requirement of non-arbitrariness in a State action.

12. In the case of *Hindustan Paper Corporation Ltd. v. Government of Kerala*, reported in AIR 1986 SC 1541, the appellant in that case challenged the decision of the Kerala High Court. Under the provision of section 6 of the Kerala Forest Produce (Fixation of Selling Price) Act of 1978, granting exemption in favour of the Government Companies and Cooperative Societies was held to be unconstitutional. The Kerala High Court was of the view that if the Government is given power to sell the produce at a lower price, then the notified rate of the Government Companies, it will enable the Government to cripple or in slow degrees to eliminate the other consumers in the field, which will amount to conferring a discriminatory and unreasonable power on the State Government. Another reason given was that the Government Company is as such a legal entity as any other entity and there being commercial activities, the Government Company could not be given any favour. The Apex Court disagreed with the view of the High Court and expressed that the Government Undertakings and the Companies form a class by themselves since any profit that they may make would in the end result in the benefit of the members of the general public. The profit, if any, enriches the public coffers and not the private coffers.

The role of industries in the public sector is very sensitive and critical from the point of view of national economy. The Court further held that their survival very often depends upon the budgetary provisions and not upon private resources which are available to the industries in the private sector. They are often established to break the power of strangulation on economy which the industries in private sector may have developed and may be using to choke the industrial growth of the country. The Apex Court, therefore, set aside the judgment of the High Court and upheld the validity of section 6 of the Act.

13. Mr Y N Oza, learned Advocate for the petitioner submits that the corrigendum dated 15.12.1995 was issued malafidely with a view to dishonestly favour respondent No.3-HIL. In order to appreciate the petitioner's contention, I have called for the original file from the concerned Ministry and read the relevant proceedings. It appears that the programme of Malaria Eradication of the State of Gujarat is implemented through respondent No.2-Commissioner, Health Services and Health Department. Malathion is to be used for insecticidal spray in the highly malaria infected area of the State. However, the purchase is to be made by the CMSO. The purchase cannot be made unless there is approval from the State Government. Thus, on receiving the demand from the Administration Department, keeping in view the budgetary provision which is to be made and utilised before 31.3.1996, the Central Purchasing Authority i.e. CMSO in anticipation of the approval of the Government, simultaneously proceeded with the exercise of inviting tenders etc. The indent for requirement of insecticides was sent by the Commissioner of Health Services-respondent No.2 to the Director, CMSO sometime in the month of July 1995. The tender enquiries were floated by the Director of CMSO for purchase of Malathion 25% water dispersible powder with ISI mark in the fourth week of September, 1995. The last date for submission of the tender was 16.10.1995. In all 8 tenders were received, a comparative statement was prepared by the Director, CMSO. The tenders were required to be considered by the Committee only after the grant of approval by the State Government. The State Government took a policy decision on 11.12.1995 to purchase the required quantity of Malathion 25% from HIL who are also manufacturer of basic insecticides. There is a note of the Additional Chief Secretary in this regard written in English. Though there was no ambiguity in the decision, it appears that while translating the same in Gujarati, in Resolution dated 14.12.1995, it was erroneously mentioned that insecticides i.e. Malathion is to be purchased from HIL, a Public Undertaking of Government of India and Companies which are

manufacturers of basic insecticides. Apparently, the latter part i.e. purchasing the insecticides from Companies which are manufacturers of basic insecticides was the case of the misreading of the Government decision and thus the corrigendum dated 15.12.1995 reflected the exact decision. In this view of the matter, I am satisfied that there was a bonafide mistake which was corrected by issuing the corrigendum dated 15.12.1995 and there is no material on the basis of which it can be said that the corrigendum was issued dishonestly to favour respondentc No.3.

14. In certain corners it is very conveniently said that lanugage is no problem in the Courts' functioning. The sort of translation provided to the Courts cannot be overlooked. It not only creates confusion but possibility of some mischief can also not be ruled out. It is one among a number of cases coming up on board daily. Lot of unnecessary energy of the Court, Lawyers and Government Off....

desirable to extract the relevant decision of the Government, its translation in Gujarati and then official translation of the Gujarati version to English (for Court) as under;

(i) A noting of the Addl. Chief Secretary as finally approved and ultimately decision of the Government.

"Department proposes to purchase

(a) xxx xxx xxx

(b) Malathion be purchased from HIL (a

Govt. of India Undertaking and also
manufacturerer of the basic
insecticides). This will avoid
difficulties of inspection,

...

insecticides etc."

(ii) The said decision taken in English has been translated into Gujarati and the circular dated 14.12.1985 has been issued, a part of which is extracted as under:

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. .

The official translation of the said circular in Gujarati has been provided to this Court which reads as under:

"Purchase of Malathion should be done by
.....

those Companies which are the basic
manufacturers of insecticides."

(iii) The said circular dated 14.12.1995 has been corrected by issuing corrigendum dated 15.12.1995. The Gujarati version reads as under:

"

The English translation of the said circular provided to the Court reads as under:

"The purchase of Malathion should be made
from the Hindustan Insecticides Limited, a
Government of India Undertaking who is

....

insecticides".

15. Learned Advocates for the petitioners have pointed out that the price quoted by HIL is much higher than what is quoted by the petitioner while the petitioner has quoted Rs.38,810/- per M.T. of Malathion 25%, the respondent-Company has quoted Rs.39,263/- per M.T. Mr J L Patidar, Regional Sales Manager, HIL, in reply to the

petition, has stated that after negotiation with the Government, they have agreed to reduce the price from Rs.39,263/- per M.T. to Rs.37,940/- per M.T. It is also stated that the price does not include Gujarat Sales Tax (5% at valorem) which has of course to be added to the above referred amount. Even if the amount would not have been reduced, this would not have affected the impugned policy decision of the State Government to purchase Malathion from HIL. It is argued by the learned Advocate for the petitioners that respondent No.3-HIL has acted in a manner which is completely against the interest of the State of Gujarat. It is pointed out that in the past i.e. in 1992-93, the very material was supplied to the Government of Gujarat by respondent No.3 @ Rs.36,575/per M.T. and in the year 1993-94, @ Rs.34,900/0 per M.T., while in the case of two other States, the very material was supplied by respondent No.3 under the National Malaria Eradication Scheme @ Rs.31,453.80 per M.T. Mr Patidar, in his affidavit filed in sur-rejoinder has denied the said allegation. It is however, admitted that the insecticides was supplied to the State of Gujarat in the year 1993-94 Rs.34,900/- per M.T. inclusive of all taxes. It is stated that the supply was made from Daman Depot. The excise duty was paid @ 10% ad-valorem as provided in the Central Excise Notification dated 1.3.1994. It is further stated that HIL has dispatched certain quantity of insecticides to Punjab, Haryana, Karnataka, and Dadranagar Haveli, in response to the order given by N.M.E.P. The price was required to be paid by the Ministry of Health and Family Welfare. The prices referred to by the petitioner i.e. Rs.31,454.80 was only a provisional price. The final price fixe4 by the Government of India on the basis of the recommendation of the Cost Accouns Branch and finally paid by the Government of India in respect of the said supplies which were carried out in 1994-95, was Rs.33,884.55 ex-factory (exclusive of C.S.T. and Excise Duty).

16. Mr Haroobhai Mehta, learned Sr.Counsel, during the course of argument, has made a statement that the HIL is prepared to supply such quantity of Malathion at the price finally fixed by the Government of India. In view of this statement, the say of the petitioners that respondent No.3 has acted against the interest of the Government of Gujarat is not sustainable.

17. It goes without saying that the Malaria Eradication Programme is of great public importance as it is connected with the health of the people. For carrying out this programme, Malathion is to be used for insecticidal spray in the highly malaria affected areas of the State. The respondent No.3-HIL remained in supply in

respect of various insecticides required by the Government of India through National Malaria Eradication Programme, which is the noddle agency set up by the Government of India for the purpose of malaria control. The HIL is a Government Company under the total control of the Government including the quality, quantity of production and the prices. The Company has a good reputation because of its capability for supply of insecticides within the time schedule. Punctuality of supply of Malathion is a factor of vital importance for taking a policy decision. Considering the past experience of supply by the petitioner - private companies and the Government companies, it was considered appropriate that purchase of Malathion be made from the HIL - a Government Company. There is no material on the basis of which it can be said that the policy decision was taken for any collateral purpose.

18. In view of the aforesaid, I am satisfied that the impugned decision has been taken in a fair and reasonable manner based on relevant consideration for good reasons and in general public interest. No malafiides are attributed to the public authorities. There is nothing to show that the decision has been taken for collateral purpose. Thus, the impugned decision cannot be said to be unjust or unfair. Such an administrative policy decision does not call for any interference by this Court in exercise of powers under Article 226 of the Constitution of India. I accordingly, declined to interfere with the policy decision of the Government. Lastly it is contended by the learned Advocates for the petitioners that the petitioners are Small Scale Industries and in view of the policy of the State Government at Annexure 'A' which is placed on record in Special Civil Applications No.437 and 471/96 to promote the Small Scale Industries, the Government has not taken into consideration this aspect. The policy decision of the Government cannot be interfered with only on the ground that the interests of the Small Scale Industries have not been taken into consideration. In any case, the petitioners may make appropriate representation to the State Government for purchase of Malathion 25% beyond 558 M.T. If such a representation is submitted within a period of two weeks from today, the same shall be considered by the State Government in its right perspective, keeping in view the policy - Annexure 'A' referred to above.

20. In view of the aforesaid, I find no merit in these Special Civil Applications and they are accordingly rejected with the aforesaid observation. Notice discharged. The ad-interim relief stand vacated. There shall be no order as to costs.

